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IN THE

Supreme Court of the United States

OCTOBER TERM—1940

No. 953

KEARNS COAL CORPORATION,
Petitioner,

against

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

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New York, May 10, 1941.

Appeal Printing Co., Inc., 130 Cedar St., New York

Table of Cases Cited

PAGE

Cahill *v.* Torrey (not officially reported), 121 N. Y. Supp. 598, 599 8

Commercial Casualty Ins. Co. *v.* Hartford Accident & Ind. Co., 190 Minn. 528 4

Continental Casualty Co. *v.* Curtis Publishing Co., C.C.A. 3rd Cir. 94 Fed. (2d) 710 4

Dougherty *v.* Milliken, 163 N. Y. 527, 533 7

Grasberger *v.* Liebert & Obert, Inc., 335 Pa. St. 491 4

Hellinger *v.* Marshall, 92 A. D. 607, 609 8

Lavine *v.* Indemnity Insurance Company of North America, 260 N. Y. 399 ..... 1, 2

Maryland Cas. Co. *v.* Bankers Ind. Ins. Co., 51 Ohio App. 323 4

Noah *v.* Bowery Savings Bank, 225 N. Y. 284, 292 7

Schutz *v.* Union Railway Co., 181 N. Y. 33, 37 7

Weatherwax *v.* Royal Indemnity Company, 250 N. Y. 281 ..... 2, 5

Statutes Cited

New York Civil Practice Act, Sec. 305 7

New York Rules of Civil Practice, Rule 129 7

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KEARNS COAL CORPORATION,
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v.
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PETITIONER'S REPLY BRIEF

A

Respondent's answer to the first point raised under "A" of the argument in petitioner's main brief is based entirely on the case of *Lavine* v. *Indemnity Insurance Company of North America*, 260 N. Y. 399. In that case, as pointed out in our main brief (p. 17) it appears from the printed record on appeal that the negligence action was commenced by the service of a summons and complaint upon the insured on August 10, 1929, which were forwarded to the defendant insurance company about a week or ten days later. The defendant insurance com-

pany never appeared nor answered on behalf of the insured in the negligence action and on September 12, 1929, about three weeks after it received the papers in the negligence action it disclaimed all liability. The insurance company did obtain a fifteen day extension of time to answer, which was signed only by plaintiff's attorneys and did not constitute an appearance nor an assumption of the defense of the action by the insurance company. The fact that the insurance company had neither appeared nor answered in the negligence action was stressed by its attorneys in their brief on the appeal.

This case upon which respondent relies and which was stated by the Circuit Court of Appeals in its opinion to be "the most nearly analogous case that we have found" is clearly distinguishable on the facts and is not in point. The insurance company in that case never assumed the control of the negligence action on behalf of the insured nor was the insured ever excluded from such defense and there was therefore no representation by conduct of the insurance company that the insured was covered by the policy nor any election by the insurance company to assume liability to the insured. The *Lavine* case did not change the law in New York State nor did it overrule the previous decisions cited by petitioner in its main brief (pp. 15 and 16). In fact the case of *Gerka* v. *Fidelity & Casualty Company*, relied on by petitioner and cited on page 15 of its main brief, is cited with approval by the Court of Appeals in the *Lavine* case.

In the case of *Weatherwax* v. *Royal Indemnity Company*, 250 N. Y. 281, cited in the *Lavine* case, the insurance company did interpose an answer on behalf of the insured, but with a reservation of all rights and a warning, prompt and unequivocal, to the insured that the insurer would withdraw if it found it had been prejudiced

by the dilatory notice of the accident, which reservation the court found the insured had assented to. The court upheld the subsequent withdrawal because of this reservation of rights. In the case at bar the assumption of the defense of the Pasley action by the respondent, United States Fidelity & Guaranty Company, was unequivocal and without reservation or condition.

The cases cited by respondent in the footnote on page 15 of its brief to the effect that a showing of prejudice is required before an equitable estoppel can arise are likewise beside the point. The question here is not whether prejudice is necessary to support an equitable estoppel, but whether prejudice will be presumed from the assumption by an insurance company of the defense of an action against the insured and the continuance of the insurer in control of that defense to the exclusion of the insured for a period of more than eight months. Our contention, which we submit is supported by the New York cases cited under point "A" in our main brief, is that prejudice under such circumstances will be presumed as a matter of law, or at the very least, that an issue of fact as to the existence of prejudice will result.

B

Respondent's counsel again urges, as he did in the argument before the Circuit Court of Appeals, that respondent was forced to appear and defend the Pasley action on behalf of the Kearns Coal Corporation because the time for that defendant to answer was about to expire. In the first place, this argument is wholly irrelevant and in the second place, it is not supported by the record. There was nothing in the conversation between Mr. Campbell of the Travelers and Mr. O'Donnell or Mr.

Dwyer of the United States Fidelity & Guaranty Company which indicated that Kearns Coal Corporation would not be taken care of by the Travelers if the respondent persisted in its refusal to defend. The conversation was a perfectly amicable business discussion between two insurance men as to which policy constituted the primary coverage and which company should defend the Kearns Coal Corporation in the Pasley action. Mr. Campbell took the position, in which he was supported by competent authority, that the Travelers policy was an excess policy so far as this truck was concerned.

Continental Casualty Co. v. *Curtis Publishing Co.*, C. C. A. 3rd Cir. 94 Fed. (2d) 710;
Commercial Casualty Ins. Co. v. *Hartford Accident & Ind. Co.*, 190 Minn. 528;
Maryland Cas. Co. v. *Bankers Ind. Ins. Co.*, 51 Ohio App. 323;
Grasberger v. *Liebert & Obert, Inc.*, 335 Pa. St. 491.

At the conclusion of the conversation the respondent's representative said that he would take the matter under consideration. Later he called back and said that they had decided to appear for Kearns Coal Corporation and to send them the summons (fols. 780, 781, 783, 784). There was nothing in the conversation, as testified to by Mr. Campbell or by Mr. O'Donnell, with respect to the time when the answer of the Kearns Corporation was due nor was there anything to indicate that there would be a default judgment obtained against Kearns Coal Corporation, regardless of the decision at which the respondent arrived. The letter advising respondent of the date when the answer was due, on which respondent's counsel and the court below in its opinion seem to lay stress, was not

written until after the respondent had made its decision to assume the defense (fol. 184).

If the situation was as suggested by petitioner's counsel when respondent assumed the defense of the Pasley action on behalf of Kearns Coal Corporation, or if respondent at that time had any reservations whatsoever with respect to its liability, it could have assumed the defense of the Pasley action with a reservation of its rights and put the insured and Travelers Insurance Company, which carried the excess insurance, on notice of that situation.

See:

Weatherwax v. *Royal Indemnity Co.*, cited under "A" (*supra*).

They then could have determined whether under those circumstances to entrust the defense of the Pasley action to the attorneys employed by respondent on behalf of all three defendants. Respondent, however, made no reservation whatsoever and its assumption of the defense of the Pasley action on behalf of Kearns Coal Corporation unequivocally and without reservation was a representation to all concerned that Kearns Coal Corporation was covered by respondent's policy and would be protected.

C

The argument of respondent under Point II of its brief to the effect that Kearns Coal Corporation was not an additional assured under the respondent's policy ignores entirely the question of estoppel. The jury specifically found that respondent at the time it assumed the defense of the Pasley action for Kearns Coal Corpora-

tion had knowledge of all the facts and circumstances relative to the custody, control and management of the truck at the time of the accident and that it also at that time had knowledge of the terms and conditions of the Travelers policy relative to its coverage on hired automobiles (fols. 1312, 1313). These findings were not, and on this record could not be, disturbed by the Circuit Court of Appeals. With knowledge of those facts respondent assumed the defense of the Pasley action on behalf of Kearns Coal Corporation without reservation, thus recognizing that company as an "additional assured" and by its conduct representing that it was covered and would be protected as an additional assured under the policy. Having done so and having continued in full control of the defense of that action through the attorneys whom it employed to represent all three defendants for a period of more than eight months, it was estopped to deny coverage to plaintiff as an additional assured. Coverage of an additional assured, as well as coverage of a named assured, may be predicated upon an estoppel, even where the risk involved was specifically excluded under the terms of the policy (see cases cited in petitioner's main brief, p. 29).

D

Respondent under Point IV of its brief argues that no actual prejudice resulted to petitioner from the assumption and conduct of the defense of the Pasley action by respondent. Even if we eliminate the question of the conduct of the examination of Mr. Kearns before trial, there was, we contend, under the New York decisions at least an issue of fact for the jury to determine whether prejudice to the petitioner resulted from respondent's assumption of the defense of the Pasley action and its con-

tinuance in the exclusive control thereof for a period of more than eight months. Moreover, actual prejudice resulted to petitioner from the conduct of the examination of Mr. Kearns before trial, as pointed out under "B" of petitioner's main brief.

The question whether the truck and driver at the time of the accident to the Pasley boy were under the supervision and control of Kearns Coal Corporation was not one on which Mr. Kearns as a lay witness was qualified to state an opinion or a conclusion, as suggested by respondent. An intelligent answer to this question required a knowledge of the New York law on supervision and control as between a special and a general employer. Moreover, the question was not one on which expert testimony of any kind was admissible, as it called for an opinion on the question directly in issue which was to be decided by the jury under instruction from the court as to the law.

> *Dougherty* v. *Milliken*, 163 N. Y. 527, 533;
> *Schutz* v. *Union Railway Co.*, 181 N. Y. 33, 37;
> *Noah* v. *Bowery Savings Bank*, 225 N. Y. 284, 292.

These questions were objectionable on the ground that they called for a conclusion of the witness, which is an objection as to form and was waived when not taken on the examination before trial.

> *New York Civil Practice Act*, Sec. 305;
> *New York Rules of Civil Practice*, Rule 129.

Objection on the trial to these questions as incompetent did not raise the point that they called for a conclusion of the witness.

Hellinger v. *Marshall,* 92 A. D. 607, 609;
Cahill v. *Torrey* (not officially reported), 121 N. Y. Supp. 598, 599.

It is clear that Mr. Kearns was under a total misapprehension as to what was necessary to constitute legal supervision and control of the truck and driver by Kearns Coal Corporation. His understanding was, as shown by the record, that if he told Williams where to take and deliver the coal, this constituted control of the truck and driver by Kearns Coal Corporation (pp. 593-595). This understanding was wholly erroneous. As stated by the New York Court of Appeals in *Charles* v. *Barrett* (cited in petitioner's main brief, p. 21):

> "Where to go and when might be determined for the driver by the commands of the defendant. The duty of going carefully, for the safety of the van as well as for that of wayfarers, remained a duty to the master at whose hands he had received possession."

The cases cited on page 23 of respondent's brief do not affect this question. They do not involve the question of supervision and control as between a general and a special employer, but merely hold that an employee who makes calls and deliveries, using his home as a base, is still considered to be engaged in the business of his general employer while returning to that base after completing his last call or delivery.

We do not charge the counsel who represented petitioner on the examination before trial with deliberate misconduct, as respondent's counsel suggests. The respondent having assumed control of the defense of the Pasley action on behalf of all three defendants and having employed the same counsel to defend all three,

both he and Mr. Kearns were entitled to assume that it made no difference whatsoever whether Kearns Coal Corporation or Newton Contracting Company was in control of the truck and driver at the time of the accident. The conduct of the examination was extremely prejudicial to petitioner, but only in the light of respondent's subsequent disclaimer.

CONCLUSION

The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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